

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:

UNION PACIFIC RAILROAD
COMPANY,

Respondent.

**ADMINISTRATIVE ORDER
ON CONSENT**

U.S. EPA Region 8

Docket No. **CERCLA-08-2004-0009**

Proceeding Under Section 122(h) of the
Comprehensive Environmental Response,
Compensation, and Liability Act, as
amended, 42 U.S.C. §9622(h).

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency, Region 8 ("EPA") and Union Pacific Railroad Company ("Respondent"). This Order provides for the reimbursement of certain response costs incurred by the United States in connection with the property, known as the "Northwest Oil Drain Site" or "NWOD" or the "Site". The Site is more particularly described by the map attached hereto as Appendix 1.

2. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated further to the signatories of this Order. This Order has been approved by the Attorney General or his designee in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1), and pursuant to the Attorney General's inherent authority to resolve claims of the United States.

3. Respondent's participation in this Order shall not constitute or be construed as an admission of liability or of EPA's findings or determinations contained in this Order except in a proceeding to enforce the terms of this Order. Respondent agrees to comply with and be bound by the terms of this Order. Respondent further agrees that it will not contest the basis or validity of this Order or its terms.

II. PARTIES BOUND

4. This Order applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of the Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter the Respondent's responsibilities under this Order.

III. DEFINITIONS

“Action Memorandum” shall mean the EPA Action Memorandum relating to the Northwest Oil Drain Site signed on April 29, 2003 by Max H. Dodson, Assistant Regional Administrator for the Office of Ecosystems Protection and Remediation, U.S. EPA Region 8. The Action Memorandum is attached hereto as Appendix 2.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

“Consent Order” or **“Order”** shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, the Order shall control.

“Day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

“Downstream Area” shall mean Segment 4 (from station 155+00 to station 355+00) and Segment 5 (from station 355+00 to station 458+00) of the Sewage Canal from the City drain to the Great Salt Lake, as described in the "Northwest Oil Drain Site Characterization Technical Memorandum," July 10, 2001.

“Effective Date” shall be the effective date of this Order as provided in Section XII.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Future Response Costs” are all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory

costs, or any other direct and indirect costs, incurred and paid by the United States in connection with the Site after the effective date of this Order.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

“Matters Addressed” means the **“Work”** the NWOD PRP Group has agreed to perform at the Site and all **“Past Response Costs”** and **“Future Response Costs,”** as those terms are further defined in this Order **“Matters Addressed”** specifically excludes EPA’s rights to enforce those matters set forth in Section VIII (Reservation of Rights) of this Order.

“NWOD PRP Group” shall mean BP Products North America Inc., Chevron USA Inc., Salt Lake City Corporation, Salt Lake County and any successor corporations or legal entities.

“Paragraph” shall mean a portion of this Consent Order identified by an Arabic numeral.

“Parties” shall mean EPA and the Respondent.

“Past Response Costs” are all costs, including but not limited to, direct and indirect costs, that the United States has paid at or in connection with the Site prior to the effective date of this Order and any Interest that may have accrued on those costs through the effective date of this Order.

“Respondent” shall mean the Union Pacific Railroad Company.

“Section” shall mean a portion of this Consent Order identified by a roman numeral.

“Site” shall mean the property known as the Northwest Oil Drain, and more particularly described by the map attached hereto as Appendix 1.

“United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

“Upstream Area” shall mean Segment 1 (from station 3+80 to station 39+00), Segment 2 (from station 39+00 to station 115+00), and Segment 3 (from station 115+00 to station 155+00), above the City Drain, and the non-flowing segment of the NWOD above these segments, as described in the "Northwest Oil Drain Site Characterization Technical Memorandum, July 10, 2001.

“**Work**” shall mean those activities the NWOD PRP Group is required to perform in accordance with the separate “Administrative Order on Consent for Removal Action,” EPA Docket No. CERCLA-08-2003-14, signed by EPA on September 18, 2003 and published in the Federal Register on November 7, 2003 (68 *Fed. Reg.* 63092). The Work to be performed is necessary to implement the removal response action selected by EPA in the “**Action Memorandum**” as defined herein.

IV. FINDINGS OF FACT

5. The NWOD is a series of former and existing unlined canals located in northern Salt Lake County, northwest of downtown Salt Lake City, Utah. The canals were used for the disposal of oil refinery sludges and residues and other municipal and industrial waste waters and storm waters beginning in approximately 1922. Historically, the system consisted of a series of canals which transported industrial waste and municipal storm water to the Great Salt Lake. The main canal flowed north along 800 West, then west just north of 1000 North, then north again at approximately 1000 West. At approximately 1400 North, the canal turns west and then north again along the border of the Rose Park disposal site. Just to the north of the Rose Park site, the Northwest Oil Drain takes a turn to a north-northwest direction and joins with the Boy Scout Drive storm drain, coming from the south along 1200 West. The channels of both of these canals have been filled south of approximately 1500 North. However, the NWOD continues to collect and divert water discharges, which enter the system immediately below the confluence of the canals from pipelines used to replace the filled-in sections of the canals.

6. Among the wastes discharged to the canals of the NWOD during its years of operation were oily and sewage sludges, rich in organic matter. Sample analyses of the sludge in upstream segments of the NWOD indicate elevated concentrations of organics, such as benzene, and metals, especially lead, copper and arsenic. The analyses of samples collected in the Downstream Area do not reveal the same concentrations or characteristics of the samples collected in the Upstream Area.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, and the Administrative Record supporting the non-time critical removal action identified in the EE/CA and selected in the Action Memorandum, EPA has determined that:

7. The Northwest Oil Drain is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

8. The contaminants found at the Site, as identified in the Findings of Fact above, include "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

9. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

10. Respondent may be liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) for releases of hazardous substances that occurred in connection with its railroad maintenance shop and railroad maintenance activities.

11. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Sections 101(22) of CERCLA, 42 U.S.C. § 9601(22).

12. The non-time critical removal action selected in the Action Memorandum and being performed by parties other than the Respondent at the Site is necessary to protect the public health and welfare or the environment and is not inconsistent with the NCP.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby ordered and agreed that Respondent shall:

13. a. Reimburse EPA for Past Response Costs incurred by the United States by remitting a cashier's or certified check(s) for **\$100,000** made payable to the "Hazardous Substance Superfund," within 30 days of the effective date of this Order to:

Mellon Bank
EPA Region 8
Attn: Superfund Accounting
P.O. Box 360859
Pittsburgh, PA 15251

or other such address as EPA may designate in writing or by wire transfer to the Federal Reserve Bank in New York to:

ABA=021030004
TREAS NYC/CTR/
BNF=/AC-68011008

Respondents shall simultaneously transmit a copy of the check to:

Financial Management Officer
EPA Region 8, TMS-F
999 18th Street, Suite 300
Denver, CO 80202

and

Cost Recovery Program Manager
EPA Region 8, ENF-RC
999 18th Street, Suite 300
Denver, CO 80202

Payments shall be designated as "Response Costs - Northwest Oil Drain Site" and shall reference the payor's name and address, the EPA site identification number **O8X7**, and the docket number of this Order.

b. In the event that the payment for Past Response Costs is not made within 30 days of the effective date of this Order, Respondent shall pay interest on the unpaid balance. Interest is established at the rate specified in Section 107(a) of CERCLA. The interest on Past Response Costs shall begin to accrue on the effective date of this Order. Interest shall accrue at the rate specified through the date of the payment. Payments of interest made under this paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section.

VII. COVENANT NOT TO SUE

14. a. Except as specifically provided in Section VIII (Reservations of Rights), EPA covenants not to sue Respondent pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), Sections 309(b) and 311 of the Clean Water Act, 42 U.S.C. § 1319 and § 1321 and Section 1002 (a) and (b)(1) of the Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) and (b)(1) for the Site, for the Matters Addressed (as defined herein) in this Order. Respondent is therefore entitled to contribution protection for the Matters Addressed in this Order as provided by Section 113(j) of CERCLA, 42 U.S.C. § 9613(j).

b. With respect to Past Response Costs, this covenant not to sue shall take effect upon Respondent's payment of Past Response Costs as required by Paragraph 13 above. With respect to Future Response Costs and the Work, this covenant not to sue shall take effect upon Respondent's certification that it has performed or paid for the performance of its proportionate share of the Work to be performed by the NWOD PRP Group in accordance with

the Administrative Order on Consent for Removal Action (EPA Docket No. CERCLA-08-2003-0014). Such certification shall include a copy of the agreement between Respondent and the NWOD PRP Group pursuant to which Respondent agrees to perform or pay for its proportionate share of the Work at the Site and, if the terms of said agreement require a cash payment, a copy of the check sent to the NWOD PRP Group to satisfy UP's payment obligation.

15. These covenants not to sue are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Order. The United States' covenant not to sue extends to Respondent, and to its predecessors-in-interest, affiliates, parents, successors and assigns but only to the extent that the liability of such predecessors-in-interest, affiliates, parents, successors and assigns arises out of Respondent's liability as set forth herein. The United States' covenant not to sue does not extend to any other person.

VIII. RESERVATION OF RIGHTS

16. a. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health or welfare or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances or pollutants or contaminants, or hazardous or solid waste on, at, or from the Site pursuant to CERCLA or any other applicable federal law or regulation. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring the Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

b. The covenant not to sue set forth in Section VII above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

1. claims based on a failure by Respondent to meet a requirement of this Order;
2. liability for costs not included within the definition of Past Response Costs and, after Respondent's certification as provided in accordance with Paragraph 14, within the definition of Future Response Costs and the Work;
3. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606, including liability for performance of response actions at the Site;

4. criminal liability;
5. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
6. liability arising from the past, present, or future disposal, release or threat of release of hazardous substances or pollutants or contaminants outside of the Site; and
7. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

IX. CONTRIBUTION PROTECTION

17. With regard to claims for contribution against Respondent for “Matters Addressed” in this Order, the Parties hereto agree that the Respondent is entitled to protection from contribution actions or claims to the extent provided by Section 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. Sections 9613(f)(2) and 9622(h)(4). The Parties hereto also agree that Respondent’s predecessors-in-interest, affiliates, parents, successors and assigns are entitled to protection from contribution actions or claims to the extent provided by Section 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. Sections 9613(f)(2) and 9622(h)(4), but only to the extent that the liability of such predecessors-in-interest, affiliates, parents, successors and assigns arises out of Respondent’s liability as set forth and settled herein. Contribution protection does not extend to any other person.

18. Nothing in this Order precludes the United States or the Respondent from asserting any claims, causes of action or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

XI. COVENANT NOT TO SUE BY RESPONDENTS

19. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Order, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

- b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Utah Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

20. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XII. EFFECTIVE DATE AND SIGNATORIES

21. This Order shall be effective immediately upon the signature of EPA, following the signature of the Respondent.

22. The undersigned representative of the Respondent certifies that he/she is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind the parties they represent to this document.

23. This Consent Order may be executed in any number of counterparts, each of which when executed and delivered to EPA shall be deemed to be an original, but such counterparts shall together constitute one and the same document.

XIII. PUBLIC COMMENT

24. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

It is so ORDERED and AGREED:

ON BEHALF OF THE UNITED STATES OF AMERICA:

BY: **SIGNED**

DATE: **2.20.04**

Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20530

ON BEHALF OF THE UNITED STATES OF AMERICA:

BY: **SIGNED**
Dale Vodenhal, Director
Superfund Remedial Program
Office of Ecosystems Protection
& Remediation
EPA Region 8

DATE: **4/14/04**

BY: **SIGNED**
Michael T. Risner, Director
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

DATE: **4/12/04**

BY: **SIGNED**
Sharon L. Kercher
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

DATE: **4-15-04**

ON BEHALF OF UNION PACIFIC RAILROAD COMPANY

BY: **SIGNED**_____

DATE: **1-13-04**_____

[Name] **Lawrence E. Wzorek**

[Title] **Assistant Vice President - Law**

**THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE
ON APRIL 20, 2004.**